

DECISION

24321
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-207026**DATE:** February 28, 1983**MATTER OF:** Major James H. Ackley, USAF, Retired**DIGEST:**

1. A retired service member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. In the absence of statutory authority similar to the Missing Persons Act, 37 U.S.C. 551-557 which permits continued payments until the member presumed dead by declaration of the Department of Defense, payment of retired pay may not be made for any period after the last date the member was known to be alive and his retired pay account is to be placed in a suspense status until the member returns or until information is received or judicial action is taken to establish his death and the date of death.
2. A retired member has been missing since the civilian plane in which he was flying as an employee of a defense contractor disappeared in Southeast Asia in 1973. Retired pay payments continued to be sent to the member's bank account (apparently a joint account with his wife) until 1981, when Finance Center first learned of missing status. Since it is not known whether the retired member is dead or alive, payments should be recouped for the period after the last date the retired member was known to be alive and credited to his account pending an acceptable determination of his existence or death.

This action is in response to a request for decision from an Air Force Accounting and Finance Officer, relating to the payment of retired pay in the case of Major James H. Ackley, USAF, Retired, who has been reported missing since March 8, 1973. We find that retired pay should not have

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been disbursed after the retiree became missing.) This matter has been assigned submission number DO-AF-1389 by the Department of Defense Military Pay and Allowance Committee.

Major Ackley was retired from the Air Force effective July 1, 1963, under the provisions of 10 U.S.C. 8911. Subsequent to his retirement, he was employed as a civilian by Air America, Inc. His employment was neither as a member of a uniformed service, nor as a civilian officer or employee of the Federal Government.

It appears that while working for Air America, the plane in which Major Ackley was flying went down in Southeast Asia on or about March 8, 1973. He has been in a missing status ever since. The Air Force first became aware of this on October 5, 1981. Since he was receiving retired pay, action was immediately taken by the Air Force Accounting and Finance Center to suspend payment of retired pay effective October 1, 1981, and to advise Mrs. Ackley as to the reasons for payment suspension. The payments were made to the member's bank account which was apparently a joint account with his wife. Thus, Mrs. Ackley has apparently received the benefit of the continued retired pay payments. A total of \$87,498.95 in retired pay had been paid by the Accounting and Finance Center between March 8, 1973, and October 1, 1981.

In response to the suspension of retired pay the Accounting and Finance Center received a letter from Mrs. Ackley's attorney, requesting reinstatement of the retired pay on the basis that Major Ackley had not been declared legally dead.

Based on the foregoing, the Air Force asks whether retired pay is payable for any period during which the member is in a missing status, and whether the Air Force is required to wait for a spouse to take action to have her husband declared dead before retired pay payments may be suspended.)

The retired pay due a retired member of the armed services accrues only during his lifetime. 48 Comp. Gen. 706 (1969). When the date of his death has been established, the only amounts payable are those which accrued until he died and they are to be paid in accordance with the

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provisions of 10 U.S.C. 2771. When a retired member is missing and there is no information concerning him, his retired pay must be suspended from the date that he was last known to be alive.) 14 Comp. Gen. 411 (1934); 43 Comp. Gen. 503 (1964); B-201128, March 6, 1981.

Thus, in Major Ackley's case his retired pay was properly suspended pending a definite determination of his status. There is no provision of law similar to the Missing Persons Act, 37 U.S.C. 551-557, which would permit continued payment of retired pay as is the case with respect to active duty pay under those provisions. Further, we are not aware of any authority for the armed services to make a determination concerning whether a retired member who is missing is deceased. The Air Force must withhold payments of retired pay as soon as they are notified that the retired member is missing. Retired pay payments may not continue pending legal action by the retired member's spouse to have him declared dead.

We would like to point out that since Major Ackley was employed by a private contractor doing business with the United States, the Secretary of Labor is authorized to make presumption of death determinations under the authority of the War Hazard Compensation Act, 42 U.S.C. 1716. We suggest that the Air Force consult the Department of Labor in this case concerning any determinations which may have been made under that authority.)

In any event until such time as a definite determination concerning Major Ackley is made the Air Force should maintain his retired pay account in a suspended status and no disbursements from that account are authorized.

While not specifically stated in 48 Comp. Gen. 706 (1969) the conclusion that payments made after the date of a retiree's last known existence must be recouped, seems to be required. Accordingly, collection under the Federal Claims Collection Act, 31 U.S.C. 3711 et seq. (formerly 31 U.S.C. 951-953 (1976)) should be commenced, taking into consideration the factors referred to in that act and the regulations promulgated pursuant thereto. See 4 C.F.R. 101 et seq. The payments received pursuant to this action should be credited

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to the retired pay account. At such time as information is received or judicial action is taken resolving the doubt as to Major Ackley's status, a settlement will be issued by this Office based on the information. Additionally, at that time consideration will be given to any remedies available to Mrs. Ackley regarding any overpayments which may have been made.

Similar cases may be treated in accordance with this decision.

for Milton J. Rowland
Comptroller General
of the United States